



DG INTERNAL MARKET AND SERVICES – Intellectual property

**Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.
COM(2013)813, 28.11.2013.**

***18 March 2014
IMCO Committee – European Parliament***

1. Trade secrets are important for economic performance in the EU, yet they are increasingly exposed to misappropriation.

Both large and small businesses

- use confidentiality as a business & research innovation management tool;
- rely on trade secrets for improving their competitiveness;
- value trade secrets as much as patents.

Trade secrets have an important role in protecting the **exchange of knowledge** between businesses within and across the borders of the **internal market** in the context of R&D and innovation.

Collaborative research, including **cross-border cooperation**, is particularly important to increase the levels of business research and development within the **internal market**.

[[See recitals 1-3](#)]

However, the exposure to misappropriation of trade secrets has been increasing.

2012 industry survey: 20% of businesses reported to have suffered attempts/acts of misappropriation within the EU in the past 10 years.

In 2012 18% of companies reported theft of information, in 2013 the percentage increased to 25% (2013/2014 Global Fraud Report, Kroll).

2. The legal protection of trade secrets within the internal market is fragmented & insufficient.

The TRIPS Agreement requires its signatories to provide protection against the misappropriation of trade secrets.

Yet, EU Member States laws on the protection of trade secrets against misappropriation feature **substantial differences, important gaps and shortcomings.**

Companies hardly defend their trade secrets in court.

Figure 4 – The fragmentation of the legal protection (selected measures)
Source of data: Baker & McKenzie (2013).

| Selected measures | AT | BE | BG | CY | CZ | DE | DK | EE | EL | ES | FI | FR | HU | IE | IT | LT | LU | LV | MT | NL | PL | PT | RO | SE | SI | SK | UK | |
|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|--|
| Definition of trade secret in civil law legislation | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Availability of injunctions against third party in good faith | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Injunctions not limited in time | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Availability of orders on destruction of TS/resulting goods | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Calculation of damages based on fair royalty fee | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Performing rules on preservation of secrecy (civil proceedings) | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Sufficient criminal legislation | | | | | | | | | | | | | | | | | | | | | | | | | | | | |

N.B. A blank cell means that the measure concerned is not provided for in national legislation

- Some Member States do not have specific legislation on misappropriation of trade secrets, relying instead on general laws as interpreted by the judiciary.
- In some Member States trade secrets are only protected against misappropriation by competitors.
- Not all appropriate remedies are present in all Member States.
- Courts do not always have mechanisms to ensure the confidentiality of trade secrets during and after litigation.

See recitals 4-6

3. The internal market is affected and its growth potential undermined.

A) Incentives to engage in innovative cross-border activity within the internal market are undermined.

B) Businesses' competitiveness is reduced, since their trade secrets-based competitive advantages face higher risks.

- 2012 Industry Survey: 40% of EU companies would **refrain from sharing** trade secrets with other parties because of fear of losing the confidentiality of the information through misuse or release without their authorisation;
- 2013 Public Consultation: more than 50% of business found that different national rules on the protection of trade secrets against misappropriation result in **less incentives to undertake R&D activities in a cross-border context.**

2012 Industry Survey: respondents believe that acts of misappropriation have mostly resulted in **loss of sales/clients/contracts** (56% of the cases).

Trade secrets are unable to fulfill their potential as drivers of economic growth and jobs within the internal market.

See recital 7

4. What is the proposed directive trying to achieve?

No harmonisation of criminal law.

Awareness raising on existing national law: insufficient.

Harmonisation of civil law protection.

INTERNAL MARKET DIMENSION!

LEGAL BASIS: 114 TFEU (Internal Market)

Approximate national laws so to ensure a sufficient and comparable level of civil redress across the **internal market** in case of unlawful acquisition, use or disclosure of a trade secret.
See Recital 8

Internal Market
and Services

Objective

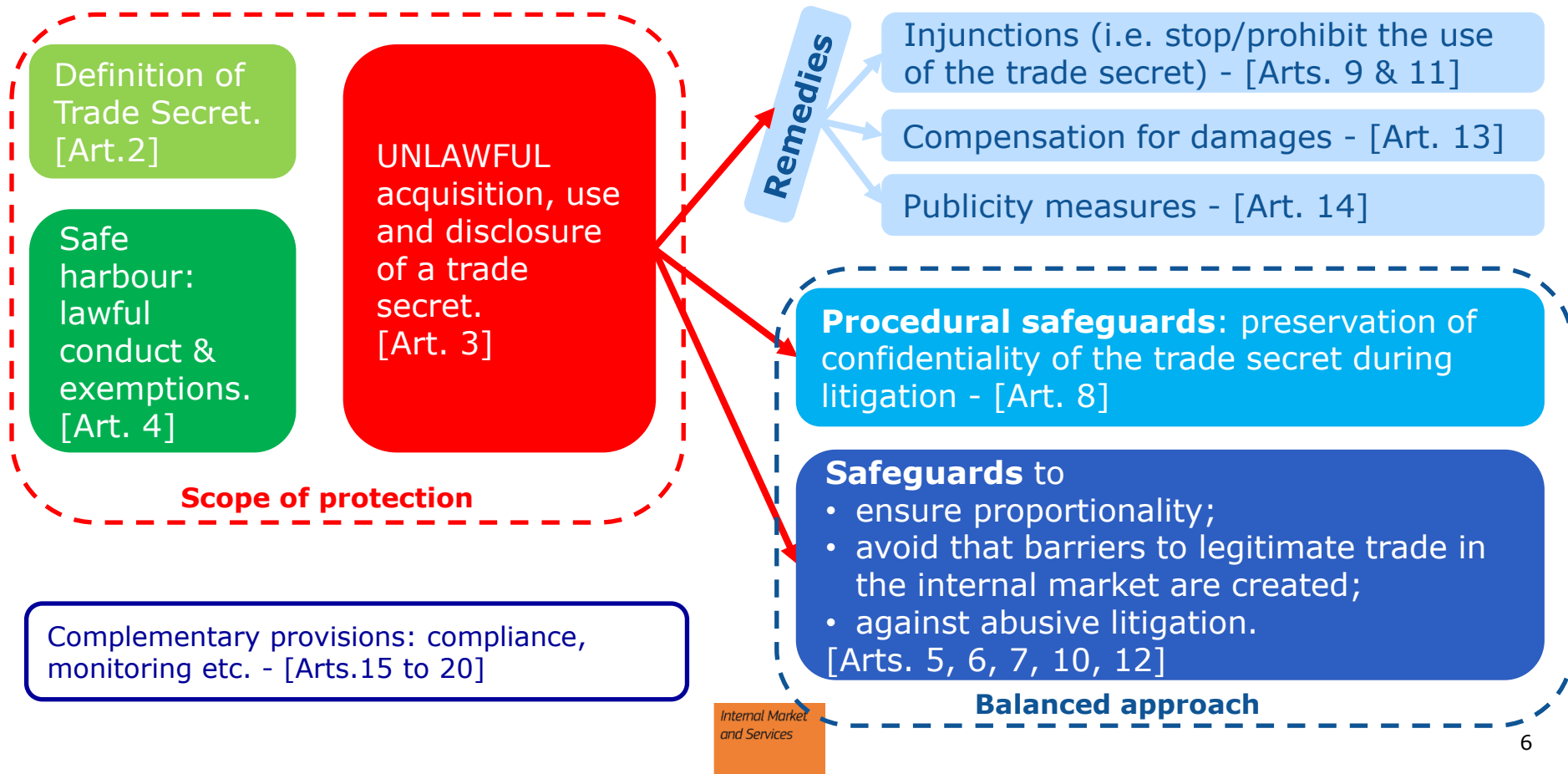
Improve the effectiveness of the legal protection of trade secrets against misappropriation within the internal market.

This should contribute to:

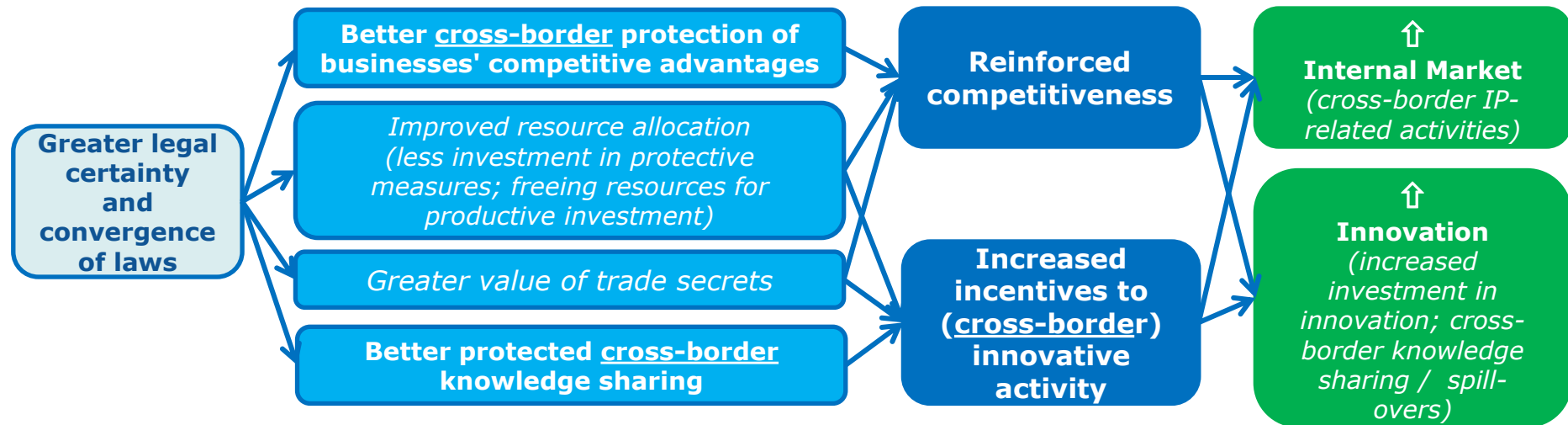
- improving the conditions for R&D and exploitation of innovation and for knowledge transfer within the **internal market**;
- protecting the **competitiveness of EU businesses**, when they rely on trade secrets.

5. What does the Directive say?

The Directive is a TRIPS Agreement-compliant text



6. What are the expected benefits of the proposed Directive



Businesses anticipate that a safer business environment resulting from harmonised EU rules should result in:

- 77%: better protection against the misappropriation of trade secrets;
- 54%: improvement of litigation in other Member States;
- 49%: increased deterrent effect;
- 63%: better opportunities for different players to cooperate in R&D and innovation projects (network/collaborative innovation as opposed to in-house innovation);
- 49%: greater returns from sharing, licencing and transferring know-how.

[Source: 2013 Public Consultation & 2012 Industry Survey]

7. What do stakeholders think?

2013 Public consultation: should legal protection against misappropriation of trade secrets be addressed at EU level? [Q. I-8]

Table 4: Need of EU action

| | No of respondents | EU should act | No EU action required | No opinion or no answer |
|----------------------------|-------------------|---------------|-----------------------|-------------------------|
| All respondents | 386 | 52% | 41% | 7% |
| Citizens | 152 | 19% | 75% | 6% |
| Companies (including SMEs) | 125 | 80% | 12% | 8% |
| SMEs | 59 | 73% | 13% | 15% |
| Professionals | 35 | 49% | 40% | 11% |
| Business associations | 32 | 94% | 6% | 0% |
| Research entities | 19 | 58% | 32% | 11% |

2012 Industry survey: should the Commission propose EU legislation with a view to ensuring that national rules providing relief against misappropriation of trade secret provide effective and equivalent protection accross the EU?

- **69%**, in favour
- **17%**, against